

#### **4 Official Opinions of the Compliance Board 67 (2004)**

##### **EXECUTIVE FUNCTION – COUNTY COUNCIL’S AGREEING TO DISMISSAL OF LAWSUIT FILED AGAINST COUNCIL, ABSENT ANY RECONSIDERATION OF COUNCIL’S PRIOR POLICY DECISIONS, HELD TO FALL WITHIN EXCLUSION**

July 12, 2004

*Allan Vought, Managing Editor  
The Aegis*

The Open Meetings Compliance Board has considered your complaint alleging that the Harford County Council violated the Open Meetings Act in connection with a meeting held April 6, 2004, in which the Council unanimously approved a legal recommendation of the Council’s Attorney, Charles Kearney, in a manner that allowed members of the public no insight into the subject of the Council’s action. The complaint alleged that, under the County’s governmental organization, the Council’s action could not have been outside the scope of the Act and that the minutes of the meeting failed to provide sufficient description of the Council’s action as required under the Act. Based on statements of the Council’s president, the complaint also alleged that the Council previously met with Mr. Kearney in connection with the matter involved, but that there is no record of a such a meeting being held.<sup>1</sup>

For the reasons explained below, we conclude that no violation occurred.

### **I**

#### **Allegation of Prior, Unannounced Meeting**

##### ***A. Complaint and Response***

The complaint stated that, at a March 30 legislative session of the Council, the Council President indicated that the members of the Council had met with the

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<sup>1</sup> The complaint also alleged violations of the Harford County Charter. Because the Compliance Board’s jurisdiction is limited to reviewing alleged violations of the Open Meetings Act, we do not address whether or not the Council’s action complied with requirement of the charter. *See, e.g., 3 Official Opinions of the Maryland Open Meetings Compliance Board* 143, 144 (2001) (Opinion 01-14).

Council Attorney to discuss a particular matter. However, there is no record of a closed meeting. Had the Council conducted a closed meeting under the Act, the complaint continued, there should have been a notice of the meeting, a recorded vote and written statement justifying the closed session, completed immediately prior to the Council's closed session, and documentation of the closed session in the minutes of the next open session of the Council. *See* §§ 10-506(a) and (b)(3), 10-508(d)(1) and (2), and 10-509(c)(2), respectively.<sup>2</sup>

In a timely response on behalf of the County Council, Charles Kearney, the attorney for the Council, denied that the closed meeting alleged to have taken place some point before March 30 ever occurred. The Council also noted that it did not meet on March 30. The Council included with its response a copy of its March 2004 calendar as evidence of the dates it met. However, the response did note that, during a legislative session on March 16, the Council President indicated his preference that the Council not go into a closed session concerning an issue and suggested instead that, should any individual member of the Council have questions, that Council member was free to discuss the matter with the Council Attorney. A copy of the Council's March 16 minutes was enclosed with the response.

***B. Analysis***

The complaint's allegation that an unannounced meeting took place between the Council and the Council Attorney is based on an inference from remarks of the Council President (according to the complaint, at a March 30 legislative session of the Council, but actually on March 16, it appears, because the Council did not meet on March 30). Perhaps the President's comment might have implied the possibility of a session at which a quorum of Council members convened to meet with the Council Attorney. The unequivocal response of the Council, however, is that no such meeting occurred. Apparently, the President was merely referring to whatever contact individual members of the Council might make with the attorney, should they have questions about the matter. The Open Meetings Act did not apply to any individual sessions of this nature that might have taken place.

**II**

**April 6 Session – Approval and Recommendation**

***A. Complaint and Response***

The core of the complaint involved an action during an open meeting on April 6. At the request of the President of the Harford County Council, a motion was

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<sup>2</sup> All statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

made to approve a recommendation of the Council Attorney, and the Council approved the motion by unanimous vote. The Council's minutes, a copy of which was included along with the complaint, described the action as follows:

**UNFINISHED BUSINESS - (Legal Recommendation of Council Attorney)**

Motion to approve the legal recommendation by Council Attorney, Charles Kearney, was made by Council Member Stepp, seconded by Council Member Chenowith and passed by unanimous votes of aye (7-0).

Proceedings of Legislative Session Number 04-11 of the County Council of Harford County, Maryland (April 6, 2004), p. 5.

The complaint argued that the manner in which the Council approved the attorney's recommendation provided insufficient detail for the public to understand the Council's action. The Council's action was described as "not public at all but [one that] amounted to a secret vote being taken in [a] public [session]." Moreover, the complaint alleged that the minutes of the April 6 meeting failed to describe the action of the Council in connection with the attorney's recommendation in sufficient detail as to satisfy the Act's requirements. The complaint asserted that, in adopting the attorney's recommendation, the Council was engaged in an advisory, legislative, or quasi-legislative function subject to the Open Meetings Act. Under the County's governmental structure, the Council could not have been engaged in an executive function. Nor was it engaged in a judicial function.<sup>3</sup>

In its response, the Council asserted that the matter addressed in the complaint involved an executive function; therefore, neither the substantive nor the procedural requirements of the Open Meetings Act applied. As explained in the response, the underlying issue was whether the Council would acquiesce to the dismissal of a lawsuit in which the Council was named as a defendant. The lawsuit followed zoning amendments and amendments to the County's master water and zoning plan, which affected the plaintiff's property. The Council described its action as a "perfunctory approval," agreeing to a stipulation of dismissal, "merely allow[ing] the County Council to uphold its position in the lawsuit." According to the Council's response, the "Council did not participate in any settlement negotiations and the signing of the dismissal did not involve the development of a new policy but rather, it was merely the application of an already established policy which was formulated when the lawsuit was initially received." A copy of the stipulation of dismissal was included with the Council's response. The Council

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<sup>3</sup> Although the complaint does not refer to a quasi-judicial function, a third type of session to which the Open Meetings Act does not apply, it is obvious that the Council's action did not involve a quasi-judicial function as defined by the Act.

further noted that the vote conducted on April 6 was not required. The president of the Council, acting in an executive capacity, could have approved the stipulation of dismissal.

Prior to the Compliance Board's consideration of this matter, we asked the Council to clarify for us why, in the Council's view, resolution of the litigation constituted an "executive function" outside of the scope of the Open Meetings Act. In particular, we asked that the Council elaborate on the applicable law that the Council was administering. In a follow-up response, the Council cited Maryland Rule 2-506 as authority for the procedure. The Council also reiterated its position that its action involved a "pro forma approval" to execute the stipulation of dismissal, ending the lawsuit against the Council, and "uphold[ing] the integrity of previous legislative actions."

***B. Analysis***

**1. Conducting business in an open session**

The Open Meetings Act does not require a public body to discuss any particular matter at a meeting. Once the public body decides to do so, however, and assuming that the Act applies and does not allow a closed session, then the meeting must meet the Act's standards for an open session.<sup>4</sup>

In other contexts, we have explained that the requirement that a public body meet in open session is not satisfied if the session is open only in name, but not in reality. *See, e.g., 4 Official Opinions of the Maryland Open Meetings Compliance Board 63, 65 (2004)*. If a public body deals with a matter in so cryptic a fashion that an observer is baffled about what is being discussed or decided, then public business is not genuinely "performed in an open and public manner." §10-501(a)(1). At a minimum, a public body considering an item in open session must ensure that those observing the meeting have the same information that someone reading the minutes from the meeting would have.

The Open Meetings Act requires a public body to keep minutes of a meeting, which must state each item considered by the public body during the course of the meeting, the action taken in connection with the item, and each recorded vote. §10-509(b) and (c)(1). Each item considered must be described in sufficient detail so that a member of the public who reviews the minutes can gain an appreciation of

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<sup>4</sup> Thus, in this case, it is immaterial that the matter of the stipulated dismissal need not have come before the Council, as the Council's response suggested, because the President of the Council could have unilaterally agreed to the dismissal. The Council made the decision to consider this matter as a body.

the issue under discussion. 3 *Official Opinions of the Maryland Open Meetings Compliance Board* 164, 166 (2001) (Opinion 01-19).

Neither the manner in which the Council Attorney's recommendation was approved on April 6 nor the account of it in the minutes satisfies these minimal criteria. Therefore, the dispositive issue is whether the Council's action involved an executive function to which the Act does not apply. § 10-503(a)(1)(i).

## **2. Executive function**

The complaint suggested that because Harford County has an elected executive, the Council "does not act in [an] 'executive function.'" While the occasions in which the County Council would engage in an executive function are undoubtedly limited under the County's governmental structure, to suggest that the Council *a priori* could never engage in an executive function is incorrect. We have held, for example, that the Baltimore City Council engaged in an executive function when it discussed certain matters of internal administration. 1 *Official Opinions of the Maryland Open Meetings Compliance Board* 157, 158 (1996) (Opinion 96-3). The question is what the body is doing in the particular case, not what its basic function is.

We have used the following test for determining whether a matter constitutes an executive function under the Open Meetings Act:

The term "executive function" is defined in part by what it is not: a discussion that constitutes an advisory, judicial, legislative, quasi-judicial, or quasi-legislative function is by definition not an executive function. If a discussion is not encompassed by any of these other functions, however, *and* involves "the administration of" existing law, it falls within the executive function exclusion. §10-502(d) ... The second aspect of the analysis requires consideration whether the matter involves the development of new policy, or merely the application of an already established law or policy. The executive function exclusion covers only the latter. ...

4 *Official Opinions of the Maryland Open Meetings Compliance Board* 28, 31 (2004). Because the Council's action simply approved its counsel's recommendation to agree to the dismissal of a lawsuit in which the Council was named as defendant, we agree that

its action does not fall within the definition of other functions under the Act that would preclude it from being an executive function.<sup>5</sup>

Thus, the question is whether the Council's action might be construed as the "administration of" current law. As we understand the facts, the plaintiff filed the lawsuit seeking to have certain property placed back in the County's water and sewer plan and to allow development of the property in accordance with its previous zoning classification prior to down zoning of the property by the Council. The lawsuit apparently challenged prior actions of the Council. In agreeing to the dismissal of the lawsuit, the Council did not engage in any negotiations or reconsideration of current policies.

When the Council enacts legislation, there is a legal presumption as to its validity. *See, e.g., People's Counsel for Baltimore County v. Beachwood I Limited Partnership*, 107 Md. App. 627, 670 A.2d 484 (1995), *cert. denied*, 342 Md. 472, 677 A.2d 565 (1996) (strong presumption of validity attached to comprehensive rezoning). In defending the status quo in this case, the Council was not engaged in the development of any policy change or the enforcement of any zoning matter. In fact, the Council would be expected to defend its prior legislative decisions, and the defense of its policy enactment constituted the first step in administration of that law. After all, a law cannot be implemented unless it is first defended against legal challenge.

In merely agreeing to its dismissal from the suit, in effect confirming that as far as the Council was concerned, the law was to be implemented as enacted, the Council was engaged in an executive function. Thus, the manner in which the Council acted on April 6 and recorded its action in the minutes of its meeting did not violate the Open Meetings Act, because the Act did not apply to that action.

This decision, we emphasize, is limited to actions that are related to the defense of prior law, unchanged from what was enacted. Had the Council engaged in any negotiations that would have required it to revisit its prior policy decisions, or otherwise engaged in any stage of policy formation, the Council's action would not have fallen within the scope of the executive function exclusion. However, under the facts presented, we conclude that the provisions of the Open Meetings Act did not apply to the Council's handling of this matter on April 6 or the required documentation of the matter in minutes of the meeting.

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<sup>5</sup> In its supplemental response, the Council argues that "certain actions by a public body do not fall under the ambit of being either legislative, advisory, or executive and therefore fall outside the coverage of the Open Meetings Act." Nearly ten years ago, the Compliance Board rejected this interpretation of the Act. 1 *Official Opinions of the Maryland Open Meetings Compliance Board* 96, 98 (1994) (Opinion 94-7). *See also* Office of the Attorney General, *Open Meetings Act Manual* pp. 12-13 (4th ed. 2000). If an action of a public body meets none of the defined functions under the Act, the Open Meetings Act would apply.

**III**

**Conclusion**

Based on the Harford County Council's explanation that the alleged meeting between the Council and its attorney prior to March 30 never occurred, the Compliance Board finds no violation in this regard. We also find that the Council's action in connection with the dismissal of the lawsuit constituted an executive function; consequently, neither the substantive nor the procedural requirements of the Open Meetings Act applied.

OPEN MEETINGS COMPLIANCE BOARD

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